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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 196

SOUTHERN MANUFACTURING COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

CARMACK COCHRAN,
WELDON B. WHITE,
CHARLES C. TRABUE, JR.,
Counsel for Petitioner.

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No. 196

SOUTHERN MANUFACTURING COMPANY,
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vs.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

The petitioner, Southern Manufacturing Company, prays that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Sixth Circuit, entered February 16, 1940 (R. 70), enforcing an order of the respondent, National Labor Relations Board, passed against petitioner on June 15, 1939 (R. 22); and to review the decree of the United States Circuit Court of Appeals for the Sixth Circuit entered April 3, 1940 (R. 82) denying petitioner's petition for suspension of the decree of February 16, 1940, and for a rehearing thereon.

Statement.

The petitioner is an employer, subject to the terms and provisions of the National Labor Relations Act (49 Stat.

449, U. S. C. A., Title 29, Sections 151-166) (R. 46). On May 24, 1938, a charge was filed before the National Labor Relations Board against petitioner by Amalgamated Clothing Workers of America, alleging unfair labor practices by petitioner (R. 17). On September 13, 1938, an amended charge was filed (R. 13). On March 21, 1939, *before any complaint was issued* by the Labor Board, a settlement of the controversy was reached, and the terms thereof embodied in a Stipulation (R. 3). The petitioner agreed to the form of an Order to be entered by respondent against it, requiring that petitioner cease and desist from certain unfair labor practices, and that petitioner employ certain named persons *on or before April 24, 1939* (R. 4). The terms of the Stipulation not included in the form of the Order agreed upon were explanatory of and interpretative of the duties of petitioner in complying with the Order (R. 5). In the Stipulation petitioner consented to the entry by the United States Circuit Court of Appeals for the appropriate circuit, upon application by the Board, of a consent decree enforcing an Order of the Board in the form set forth and waived further notice of the application for such decree (R. 6). This consent was given with the understanding by representatives of petitioner that there would be no enforcement unless petitioner acted contrary to the agreed Order, and the interpretative terms of the Stipulation (R. 36). Petitioner complied with the terms of the Order and settlement Stipulation before April 24, 1939 (R. 36). *On April 27, 1939, respondent issued its Complaint against petitioner,* and gave notice of a hearing to take place May 3, 1939, in the office of the Chief Trial Examiner in Washington, D. C. (R. 9). Before the issuance of the Complaint and the service of the notice of hearing, however, respondent, through its Executive Secretary, notified the petitioner that such Complaint would issue and such hearing would be had "for the single purpose of introducing

into the record the Stipulation signed by the parties" (Exhibit C, Answer, R. 37). On May 3, 1939, the formal hearing occurred upon which nothing took place other than the filing of the Stipulation (R. 1). On June 15, 1939, the formal Order, as provided in the Stipulation, was entered (R. 22). On July 27, 1939, the respondent filed with the United States Circuit Court of Appeals for the Sixth Circuit its petition for enforcement of the Order entered June 15, 1939 (R. 29). *There was no allegation that any order or decree of the respondent had been violated, or that any violation was threatened, or that any unfair labor practice was then occurring* (R. 29). Petitioner replied that it had complied in detail with the terms of the settlement Stipulation (R. 33), and resisted the entry of the Order of enforcement on the following grounds:

1. There is no present justiciable controversy. No act is being done or threatened in violation of the Board order or the National Labor Relations Act (R. 55).

2. The enforcement prayed is not the enforcement intended by the National Labor Relations Act. See Title 29, Sec. 160 (e), U. S. C. A.; Sec. 10 (e), 49 Stat. 453 (R. 55).

3. The entry of this decree of enforcement, even if allowable, is a matter of discretion, and it will not be entered where the Board has failed to act promptly, and where there is no allegation of disregard of or failure to comply with the order (R. 55).

4. A decree of enforcement of the Board's order is sought without giving to the respondent the benefit of those provisions of the Stipulation which are essentially interpretative of, and a part of the Board's order (R. 55).

On February 16, 1940, the United States Circuit Court of Appeals for the Sixth Circuit entered its Order enforc-

ing the Order of the Board (R. 70). Thereafter on February 23, 1940, petitioner filed its petition for suspension of this decree and a rehearing, pointing out that on October 13, 1939, the court had considered the matter, and without entering a formal order had declined to enter the Order of enforcement. Petitioner relied upon its original objection to the entry of the Order, which the court had sustained on October 13, 1939, and prayed a reconsideration of the court's action, and a rehearing (R. 72). On April 3, 1940, the court denied the petition for a suspension of the decree, and for a rehearing (R. 82).

Question Presented.

Under the foregoing circumstances upon the record presented, should the United States Circuit Court of Appeals for the Sixth Circuit have entered its Order enforcing the Order of the National Labor Relations Board?

Statute Involved.

> "(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon

shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347)."

Sec. 10(e) 49 Stat. 449; U. S. C. A. title 29, Sec. 160(e).

Reasons for Granting the Petition.

1. The court erred in entering its Order enforcing the Order of the National Labor Relations Board, there having been no labor controversy pending at the time of the issuance of the Board's Complaint, and there being no violation or threatened violation of the Board's Order when the petition for enforcement was filed.

2. The delay between the time of the signing of the settlement Stipulation and the filing of the petition for enforcement with no allegation that petitioner was disregarding the Board's order, or had failed to comply therewith, required the dismissal of the Board's petition for enforcement. This position is supported by the decision of the United States Circuit Court of Appeals for the Third Circuit, in the case of *National Labor Relations Board* v. *LaSalle Hat Company*, 105 F. (2d) 709, 710.

3. There is a difference of opinion between the various United States Circuit Courts of Appeal and the judges thereof as to whether or not following an order of the National Labor Relations Board, based upon a settlement stipulation, the court should entertain a petition for an enforcement of said order without something in defiance of that order appearing. In *National Labor Relations Board* v. *Pure Oil Company*, 103 F. (2d) 497, the majority of the court held that the petition should be granted, and the order of enforcement entered. In the same case, *National Labor Relations Board* v. *Pure Oil Company*, 103 F. (2d) 497, 498-499, there was a strong dissenting opinion that under the circumstances there was no justiciable controversy shown. The United States Circuit Court of Appeals for the Seventh Circuit, in *National Labor Relations Board* v. *Gerling Furniture Mfg. Co.*, 103 F. (2d) 663, held that under these circumstances the

order of enforcement should be entered by the court, basing its opinion upon the analogy of a ruling of that court under the enforcement provisions of the Federal Trade Commission Act, 38 Stat. 717, U. S. C. Title 15, Sec. 45, the case being *Fairyfoot Products Company* v. *Federal Trade Commission,* 80 (7th Circuit) F. (2d) 684. This Court failed to note in its opinion that the case relied upon came on to be heard further under the style *Federal Trade Commission* v. *Fairyfoot Products Company* (7th Circuit), 94 F. (2d) 844, in which latter case the court expressly approved the rule adopted in the case of *Silver Company* v. *Federal Trade Commission,* 292 Fed. 752, and *Butterick Co., et al.* v. *Federal Trade Commission,* 4 F. (2d) 910, certiorari denied, 267 U. S. 602, 69 Law Ed. 808, to the effect that the parties to a petition for enforcement appeared in the nature of parties to a suit in equity, and in order for the order of enforcement to issue there must be some allegation of a violation or threatened violation of the order of the Board or Commission.

4. The Order of enforcement should not have been entered by the United States Circuit Court of Appeals for the Sixth Circuit without giving effect to or incorporating therein the provisions of the Stipulation interpretative of the method of performing the affirmative actions required of petitioner by the Board's Order (R. 7). There is no official report of the Order in the United States Circuit Court of Appeals in this case.

5. The facts of this case are not controlled by the holding of the United States Supreme Court in *National Labor Relations Board* v. *Pennsylvania Greyhound Lines,* 303 U. S. 261, 82 Law Ed. 831, and *Federal Trade Commission* v. *Goodyear Tire & Rubber Company,* 304 U. S. 257, 82 Law Ed. 1326. In the first named case it is apparent that

at the time the Board filed its petition in the United States Circuit Court of Appeals for the Third Circuit for enforcement of its Order, the Pennsylvania Greyhound Lines was bitterly contesting the Order. In the case of *Federal Trade Commission* v. *Goodyear Tire & Rubber Company*, 304 U. S. 257, 82 Law Ed. 1326, the Goodyear Tire & Rubber Company was itself petitioner before the United States Circuit Court of Appeals for the Sixth Circuit, asking a review of the action of the Federal Trade Commission at the time of the passage of the Act of Congress which the Goodyear Tire & Rubber Company insisted made the litigation a moot question. In the case at bar the entire controversy had been settled under the supervision of the National Labor Relations Board on March 21, 1939, and the settlement completed on April 24, 1939 before the Board issued its formal Complaint on April 27, 1939.

6. The ruling of the United States Circuit Court of Appeals for the Sixth Circuit if allowed to stand will have far reaching effects. It will discourage the settlement of charges pending before the National Labor Relations Board before a Complaint is issued, for the very purpose of such settlement is to avoid government by injunction under an order of enforcement of a United States Circuit Court of Appeals. If the ruling is allowed to stand the United States Circuit Court of Appeals becomes a mere registry for the orders of the National Labor Relations Board, and businesses which have compromised and settled their difficulties with their employees under the supervision of the National Labor Relations Board find themselves living thenceforth forever subject to the injunctive processes of the United States Circuit Court of Appeals, and the probability of a contempt proceeding at the instance of any disgruntled employee. The effect thus is far reaching and is most important when settlement of charges filed by employees

against employers should be encouraged before a Complaint is issued by the National Labor Relations Board, and all parties put to the expense of a costly hearing.

Your petitioner appends hereto its brief in support of this petition.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the decree of the United States Circuit Court of Appeals for the Sixth Circuit should be granted.

COCHRAN & WHITE,
CHAS. C. TRABUE, JR.,
Solicitors for Petitioner.

June 27, 1940.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 196

SOUTHERN MANUFACTURING COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Statement.

This is an application for a writ of certiorari for a review of the decree of the United States Circuit Court of Appeals for the Sixth Circuit enforcing an Order of the National Labor Relations Board, entered against respondent on February 16, 1940, a petition for a suspension of the Order of enforcement and a re-hearing thereon having been denied by the Court on April 3, 1940.

Certain of the material facts and the question involved are set forth in the foregoing petition.

The questions for a decision are:

1. Where there has been a voluntary settlement between employer and employees of matters involved in charges filed before the National Labor Relations Board by the employees, such settlement taking place under the auspices

of, and before any Complaint has been issued by, the Board, and the settlement agreement having been fully complied with before the formal issuance of a Complaint by the Board, such Complaint being issued purely for the purpose of formally introducing the settlement Stipulation into the record, is the Board entitled under Section 10(e) 49 Stat. 449, U. S. C. A. Title 29, Section 160(e) to a decree of enforcement by the United States Circuit Court of Appeals, where the agreement for a decree of enforcement as a part of the settlement Stipulation was agreed to by the employer, with the understanding that no such application would be made unless there was a violation of the terms of the Stipulation, and particularly where the petition for enforcement alleges no failure to comply with the terms of the settlement Stipulation, either before or after the Complaint of the Labor Board was formally issued?

2. If the National Labor Relations Board is entitled to an Order of enforcement of its Order under the circumstances set out in the first question above, should the Order of enforcement be entered by the United States Circuit Court of Appeals without giving some recognition to or considering the effect of the explanatory and interpretative provisions of the Stipulation, not a part of the formal Order, but outlining the procedure by which the Order will be complied with?

The contention of the petitioner is that, first, the Order of enforcement should not have been entered, and, second, even if the Order were entered the petitioner is entitled to have the benefit of the explanatory and interpretative provisions of the Stipulation, and entitled to have them made a part of the Order of enforcement.

The Pleadings and the Facts.

While certain of the material and pertinent facts have been stated in the petition, for emphasis as well as clarity

we again refer to those facts as stated in the record certified to the United States Circuit Court of Appeals for the Sixth Circuit by the National Labor Relations Board (R. 27) and the proceeding in the Circuit Court of Appeals.

Since there was no evidence taken by the Trial Examiner for the National Labor Relations Board, but his hearing was held for the sole purpose of introducing the settlement Stipulation (R. 1) the certified record from the National Labor Relations Board to the court merely contained a record of this hearing (R. 1) in Volume I thereof, and in Volume II thereof the settlement Stipulation with exhibits, and the Complaint issued by the National Labor Relations Board with the charges as exhibits (R. 3), and in Volume III the certified Orders of the National Labor Relations Board approving the Stipulation and entering the Order as stipulated (R. 22).

The petition of the National Labor Relations Board for enforcement of its Order merely stated the Stipulation of the parties and asked for an Order of enforcement (R. 29).

The answer of Southern Manufacturing Company, respondent there and petitioner here, sets out the facts surrounding the entering into the settlement Stipulation on March 21, 1939, and further points out that the real controversy at that time was the requirement that petitioner employ certain named employees on or before April 24, 1939 (R. 33). The answer further avers:

> "(3) Following the drafting and signing of said Stipulation and on April 27, 1939, the Board issued its 'Complaint' against Respondent, a true and exact copy of which together with the 'Notice of Hearing' and 'Charge' and 'Amended Charge' appended thereto are filed jointly as Exhibit "B" hereto, and are incorporated herein by reference insofar as it may be necessary or proper so to do. The real insisted bases of the 'Complaint' as finally made by the Board are embodied in paragraphs 4 and 5 thereof, as follows:

"'4. During the month of October, 1937, and thereafter, particularly in April, 1938, said respondent, through its officers, agents and employees, discouraged membership in the Amalgamated Clothing Workers of America, and interfered with and restrained its employees in the exercise of their rights under the Act, by advising, urging, and warning its employees not to join the Amalgamated, by requiring as a condition of employment the signature of each individual employee to an individual contract of employment, obligating the employee not to join the Amalgamated, and by other acts well known to the respondent.

"'5. On or about March 29, 1938, and at all times thereafter, the respondent, through its officers and agents, has refused to give employment to the following named individuals:

Florence Richardson	Maggie Randolph
Maude Carter	Frieda Chandler
Estelle Cothern	Dixie Carter
Maud Foster	Minnie Lee Jordan
Annie Freeman	Jack W. Smith
Daisy Harris	Susie E. Walker
Ida Mae Lane	Vella B. Warren
Earline McDonald	Mildred White
Myrtle Merritt	Mrs. Maude Chaffin
Bessie Moore	Daisy Melton

because of their membership in, and activities in behalf of the Amalgamated Clothing Workers of America. All the said employees named above were employees of the Washington Manufacturing Company, to which company the respondent is a successor. All of said individuals named above were also refused employment because of their refusal to sign the individual contracts mentioned above in paragraph 4.'

"(4) The 'Complaint' charges that the Respondent, by virtue of its acts, as set out in paragraphs 4 and 5 above quoted, was guilty of a violation of Section 8, subdivision (1), and Section 8, subdivision (3) of the

National Labor Relations Act. In Paragraph 4 of the 'Complaint', filed April 27, 1939, it is alleged that the last act in alleged violation of Section 8, subdivision (1) of the Act was committed in April, 1938, one year preceding the filing of the 'Complaint'. The real gravamen of the 'Complaint' is set out in paragraph 5, wherein it is alleged that Respondent has violated Section 8, subdivision (3) of the Act. At the time of the filing of the 'Complaint' on April 27, 1939, Respondent, prior to April 24, 1939, had complied with the terms of the Stipulation and had offered reinstatement to the employees named in paragraph 5 of the 'Complaint'.

"(5) Notice of the issuance of this 'Complaint' and the reason for the issuance thereof came to Respondent on or about April 15, 1939, in the form of communication from the Board dated April 13, 1939. A true and exact copy of this communication is filed herewith as Exhibit "C", and is incorporated herein by reference insofar as it may be necessary or proper so to do. An examination of this communication indicates that all parties then understood the matter to be moot as no further dispute or controversy existed.

"(6) Respondent having been notified that the 'Complaint' and hearing thereon were merely formal, offered no real resistance to the allegations thereof, and did not press the answer which its counsel prepared thereto. On or about June 17, 1939, Respondent received notice that the Board had entered its formal 'Decision and Order' on the 'Complaint' and presumed that the matter was closed since there had been no insistence that the Respondent had failed to comply with its agreement under the settlement Stipulation. Respondent received no further notice of any action contemplated until on or about July 27, 1939, it was notified of the filing of this 'Petition For Enforcement, etc.'

"(7) Respondent has complied in detail with the terms of the settlement Stipulation. Respondent verily believed at the time of the signing thereof that the purpose of inserting paragraph 7, providing for the entry

in this Honorable Court of a consent decree enforcing this Order, was solely in order that proper action might be taken against Respondent should it fail to discharge its obligations under the settlement Stipulation, and so understood when it caused its corporate name to be affixed thereto by its authorized officer. Respondent alleges that the controvery is settled and its obligations discharged. There is no allegation of the 'Petition' to the contrary.

"(8) Respondent is advised that no justiciable controversy is presented under these facts. The 'Petition' wholly fails to mention anything which Respondent has done or threatened or refused to do, and which requires this Court to do something in the way of enforcement. There is no allegation that Respondent has done anything in defiance of the Order. Respondent respectfully submits that this is not a proper case for the entry of a decree enforcing an order of the Board, that order itself having been passed long after the controversy had been settled and the settlement terms fulfilled" (R. 35).

There is made as Exhibit "C" to the answer a copy of a letter from the Secretary of the National Labor Relations Board, wherein among other things it is said in explanation of why the complaint will be issued after the issuance of a complaint was waived in the stipulation:

"Since the parties are agreed upon the settlement of the dispute, and the purpose of the hearing is merely to introduce formally into the record the Stipulation of settlement agreed upon, no statement concerning the proceeding will be made to the press" (R. 38).

The matter was thus before the court on petition and answer as any equity proceeding. Without objecting to the allegations of the answer in any form for the record the Board filed its memorandum in support of its petition, and petitioner Southern Manufacturing Company filed its mem-

orandum in support of its objections to the approval and entry of an order of enforcement. The memorandum of the National Labor Relations Board appears in the record at page 39. The insistencies of petitioner, respondent below, in its memorandum appear in the record hereto at page 46.

The petition for enforcement was filed July 27, 1939 (R. 29). On February 8, 1940, by motion, the National Labor Relations Board renewed its application for an Order of enforcement, filing in support thereof the affidavits of Warren Wood and Gerhard Van Arkel, National Labor Relations Board attorneys, to the effect that they had given representatives of petitioner, respondent below, no reason to believe that there would be no application for an order of enforcement unless petitioner, respondent below, failed to comply with the terms of the settlement Stipulation (R. 66).

On February 16, 1940, the United States Circuit Court of Appeals for the Sixth Circuit entered its Order decreeing an enforcement of the Order of the National Labor Relations Board, but making no reference to and giving no consideration to the effect of the explanatory and interpretative provisions of the Stipulation, which described the manner and form of compliance with the Order (R. 70).

On February 23, 1940, petitioner, respondent below, filed its petition for suspension of the decree of February 18, 1940, and for a rehearing, pointing out that the court on October 13, 1939, with the full record of the entire proceeding before it had considered the matter and then declined to enter the Order as prayed by the National Labor Relations Board (R. 72).

In support of this petition the affidavit of P. M. French, president of the petitioner, respondent below, was filed, wherein he made oath that he verily believed and understood that the sole purpose of inserting the provision in the

settlement Stipulation, agreeing to the entry of an Order of enforcement in the United States Circuit Court of Appeals, was for the purpose of enforcing the Order of the National Labor Relations Board in the event Southern Manufacturing Company failed to do what it proposed to do under the settlement (R. 77).

The entire record then before the United States Circuit Court of Appeals for the Sixth Circuit was in this condition. The Board filed its petition for a decree of the court enforcing the Board's Order. The petitioner, respondent below, answered denying the right of the Board to such relief, and setting out the reasons for its position. The Board then filed its memorandum, wherein it concludes that "respondent's objections to the approval of a consent decree are without merit", which as we construe it amounts to a motion to strike the answer of respondent as being insufficient on its face, and as such amounts to an admission of the averments of the answer (R. 39).

In our discussion of the case we shall proceed upon the pleadings as being in that status, that is the National Labor Relations Board admits the averments of the answer of the petitioner, Southern Manufacturing Company, but denies that they are sufficient to meet the allegations of the petition.

The Stipulation and the Order Sought to be Enforced.

Section 1 of the Order of the National Labor Relations Board against petitioner sought to be enforced in the United States Circuit Court of Appeals embodies the cease and desist provisions amounting to no more or less than an enjoining of the respondent to obey the provisions of the National Labor Relations Act (R. 27).

Significant as indicating that the respondent had been guilty of no unfair labor practices is the fact that while

Section 2(a) of the Order requires employment of 22 of the 73 employees concerned, on or before April 24, 1939, there is no allowance for back pay extending, according to the charge and amended charge (R. 28) for almost a year preceding the date of the Stipulation. As a matter of fact in the Stipulation petitioner denies any liability for back pay, and thereby denies any unfair labor practices (R. 6).

The Order in and of itself does not embody the settlement agreement in full. The respondent is required to give employment to certain persons named in Section 2(a), on or before April 24, 1939. Paragraph 4 of the Stipulation interprets this provision of the Order as follows:

> "4. It is the understanding of the parties that in carrying out Section 2 (a) of the above Order, that all persons therein named shall be returned to work on or before April 24, 1939, unless for good cause shown the Regional Director for the Tenth Region grants an extension of this time period. The persons named in paragraph 2 (a) of the Board's Order will be placed upon a preferential list to be given the first available employment on jobs for which their previous job experience qualifies them. The Regional Director for the Tenth Region will furnish Southern Manufacturing Company with the present addresses and work qualifications of the individuals named in paragraph 2 (a) of the Board's Order. As soon as employment becomes available, Southern Manufacturing Company shall undertake to advise the persons so qualified of the availability of such employment by registered mail, return receipt requested, with the understanding that if an answer is not received and definite employment arrangements made within five (5) days, Southern Manufacturing Company will be relieved of further obligation to offer employment to such persons under this Order. *It is the understanding of the parties that Southern Manufacturing Company is released from any claim for back pay, which is alleged to be due any persons named in the original charge or any amendment*

thereto, to the date hereof. The Southern Manufacturing Company does not admit liability for back pay to any former employee of Washington Manufacturing Company or to any other person." (Italics ours.)

Par. 4, Stipulation (R. 5).

Further, methods of employment and reemployment are set out in the Stipulation as follows:

"6. When any reduction in working force becomes necessary, the Southern Manufacturing Company agrees that those last employed on the operation where there is an excess of workers shall be laid off first and upon the opening of the plant following temporary close-down, those oldest in point of service of Southern Manufacturing Company shall be first employed. The foregoing is subject to the right of Southern Manufacturing Company to maintain positive standards of efficiency and competency on the part of its employees and such right is in no wise impaired by this agreement."

Pars. 4 and 6, Stipulation (R. 6).

It was likewise understood that when posting notices of the Board's disposition of the case, respondent could post the entire Stipulation:

"5. It is the understanding of the parties hereto that the Company may post with the notices required to be posted in Paragraph 2 (b) of the Board's Order above, this entire stipulation or any part or parts thereof."

Par. 5, Stipulation (R. 6).

Following all the provisions of the Stipulation and, as respondent understood, purely as a method of enforcing compliance with the terms of the Stipulation should the respondent fail to do so, the following paragraph was inserted:

"7. The respondent, Southern Manufacturing Company, hereby consents to the entry by the United States Circuit Court of Appeals for the appropriate circuit, upon application by the Board, of a consent decree enforcing an order of the Board in the form hereinabove set forth and hereby waives further notice of the application for such decree."

Paragraph 7, Stipulation (R. 6).

Of course, any order enforced would necessarily embody and give full significance to the interpretative provisions of the Stipulation in fairness to respondent. A violation of the Order could be determined only after considering these interpretations in connection with the alleged violative act. The words "in the form hereinabove set forth" refer as much to the interpretations as they do to the Order itself.

As heretofore stated, on July 25, 1939, the Board filed its petition to enforce an agreement made March 21, 1939, settling a controversy based upon charges filed with the National Labor Relations Board of unfair labor practices, the last of which was in April, 1938 (R. 9). In its petition the Board made no insistence that there had been a failure on the part of Southern Manufacturing Company to comply with this agreement. There was no insistence that petitioner had been guilty of any unfair labor practice since March 21, 1939 (R. 29). There was an effort in filing the affidavits of counsel for the National Labor Relations Board in February, 1940, to show that certain charges have been made since the Board sought enforcement of its Order, and these charges are being investigated, but even these affidavits do not allege that there has been a violation, they merely state that the charges are being investigated (R. 68). We respectfully submit that these affidavits could not be considered by the court on an application for an Order of enforcement, but that the court was bound by the record before it in the form of the petition and the answer, the

averments of which were admitted by the memorandum in the form of a motion to strike the answer (R. 39).

We respectfully submit that the parties were before the court in the status of complainant and defendant in equity, with the National Labor Relations Board in the position of a complainant seeking an injunction. Granting of the Order of enforcement is the granting of an injunctive Order, without an allegation that injury is being done or threatened. We further submit that upon application for an injunction in equity in the courts of the United States affidavits filed in support of the petition cannot be considered.

Insistencies of Petitioner.

1. There is no present justiciable controversy. No act is being done or threatened in violation of the Board order or the National Labor Relations Act.

2. The enforcement prayed is not the enforcement intended by the National Labor Relations Act. See Title 29, Sec. 160 (e) U. S. C. A.; Sec. 10 (e) 49 Stat. 453.

3. The entry of this decree of enforcement, even if allowable, is a matter of discretion, and it will not be entered where the Board has failed to act promptly, and where there is no allegation of disregard of or failure to comply with the order.

4. A decree of enforcement of the Board's order is sought without giving to the respondent the benefit of those provisions of the Stipulation which are essentially interpretative of, and a part of the Board's order.

Propositions of Law.

1.

(a) The jurisdiction of the Circuit Court of Appeals upon petitions to enforce orders of the National Labor Relations

Board is original rather than appellate, and the decrees of the Court in such cases should be upon the lines adopted by courts of equity generally in hearing suits for injunctions.

L. B. Silver Co. *v.* Federal Trade Com. (Court of Appeals, Sixth Circuit), 229 Fed. 752;

Butterick Co. et al. *v.* Federal Trade Com. (Court of Appeals, Second Circuit), 4 F. (2d) 910; Cert. den. 267 U. S. 602, 69 L. Ed. 808.

(b) "It is the general practice in such cases that if the defendant is continuing or threatening unlawful acts there will be an injunction; but if whatever was unlawful ceased long before the bill was filed, and as soon as it was brought to the attention of the defendant by complaint and there is no reason to apprehend its renewal the bill will be dismissed without prejudice."

L. B. Silver Co. *v.* Federal Trade Com. (Court of Appeals Sixth Circuit), 202 Fed. 752;

Butterick Co. et al. *v.* Federal Trade Com. (Court of Appeals, Second Circuit), 4 F. (2d) 910; Cert. den. 267 U. S. 602, 69 L. Ed. 808.

(c) "But there is deeper reason why the Board's petition here should be denied. No justiciable controversy is shown. This is a court, and as such under the Constitution can act only on cases and controversies. The court is not a registration office for the orders of the Board. Nor is the Board an arm of the court. When, proceeding under the Act, Sect. 10(e), 29 U. S. C. A. Par. 160(e), the Board asks enforcement of an order, it comes into court as a litigant. It must show some specific thing that ought to be done or prohibited, and not that the person proceeded against, having been found a first offender in some one particular, ought to be put on general probation by the court."

Dissenting Opinion, Sibley, Circuit Judge, N. L. R. B. *v.* Pure Oil Co. (Fifth Circuit), 103 F. (2d) 497, 499.

(d) To justify the use of the extraordinary power of a court of equity there must be some allegation and proof of threatened injury under some of the recognized sources of equitable jurisdiction.

Petroleum Exploration *v.* Public Service Com., 304 U. S. 209, 58 Sup. Crt. 834, 82 L. Ed. 1294.

(c) Affidavits filed in support of an application for a temporary injunction may not be considered in determining whether the complaint states facts to constitute ground for relief.

Missouri B. R. *v.* Norwood, 283 U. S. 249, 51 Sup. Crt. 458, 75 L. Ed. 1010.

2.

(a) There is no present need of enforcement and no present case or controversy exists. It is not proper nor within the power of the Court to command generally in the very words of the Act that the respondent in the future shall not do what the Act forbids on pain of being in contempt of Court. This is not the enforcement intended by the Act, but would tend to supersede the functions of the Board. If respondent should do or threaten anything in the future contrary to the order, as limited by a reasonable construction, a case would arise for enforcement of it. If something new should be done contrary to the Act, the Board should investigate it and find the facts and make a further order, asking court aid to enforce it if it becomes necessary. A blanket injunction enforcement without any present controversy is unlawful.

Dissenting Opinion, Sibley, Circuit Judge N. L. R. B. *v.* Pure Oil Co. (Fifth Circuit), 103 F. (2d) 497, 499;

New York, etc., R. Co. *v.* I. C. C., 200 U. S. 361, 404, 50 L. Ed. 515.

3.

(a) "The petition is under Section 10(e) of the Act, which gives the court 'power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board.' Entry of the Court's order is a matter of discretion."

N. L. R. B. *v.* LaSalle Hat Co. (Third Circuit), 105 F. (2d) 709.

(b) Where there has been a long delay following the signing of the settlement stipulation and the petition of the Board for enforcement makes no allegation that respondent is disregarding the Board's order, or has failed to comply with its provisions, the petition will be denied. Practice under this Act should be prompt in order to make it effective. In such case if the respondent fails to comply with the Board's order it can apply to the Court for enforcement.

N. L. R. B. *v.* LaSalle Hat Co. (Third Circuit), 105 F. (2d) 709, 710.

Argument.

We do most respectfully insist that our contentions, as hereinabove set forth, are conclusive in our support. Below counsel for the Board cited a number of cases as holding to the contrary. In considering these authorities so cited by the respondent, petitioner below, we call attention to this circumstance, which the National Labor Relations Board entirely overlooks.

There was no controversy pending when the Board issued its formal "Complaint" or its cease and desist order. This Complaint was not issued to force respondent to desist from any unfair labor practice.

In our answer we say, and the ~~petitioner,~~ respondent by its method of presenting this matter, admits:

> "At the time of the filing of the 'Complaint' on April 27, 1939, Respondent, prior to April 24, 1939, had complied with the terms of the Stipulation and had offered reinstatement to the employees named in paragraph 5 of the 'Complaint'.
>
> * * * * * * *
>
> "Respondent respectfully submits that this is not a proper case for the entry of a decree enforcing an order

of the Board, that order itself having been passed long after the controversy had been settled and the settlement terms fulfilled."

Answer, see also Letter Ex. C. to Answer (R. 33, 37).

It is true that in the case of *N. L. R. B.* v. *Penn. Greyhound Lines*, 303 U. S. 250, 271, 58 Sup. Ct. 571, 576, the Supreme Court holds that an order of the Board in the case there pending did not become moot because it was obeyed. In that case it is apparent that *when the Board passed its order the respondent was continuing the unfair labor practice complained of.* Such is not the case here.

The case of *N. L. R. B.* v. *Gerling Furniture Manufacturing Company*, 103 F. (2d) 663, C. C. A. 7 is cited as authority for granting the relief prayed by ~~petitioner.~~ respondent. In frankness we must concede that a cursory examination of the opinion of the court in that case gives support to ~~petitioner's~~ respondent's insistence. A deeper examination of the opinion, and of the authorities relied upon by that court for its opinion is enlightening. In its opinion in the *Gerling* case, the court draws an analogy between the enforcement provisions of the Federal Trade Commission Acts (U. S. C. A. Title 15, Section 45, 38 Stat. 717) and the similar provisions of the National Labor Relations Act (U. S. C. A. Title 29, Sec. 160 (e) and 160 (f), 49 Stat. 453). The court then pointed out, that following the enforcement provisions of the Federal Trade Commission the same court in *Fairyfoot Products Company* v. *Federal Trade Commission*, 80 F. (2d) 684, held that the discontinuance of an unfair competitive practice would not serve to bar a cease and desist order based on that discontinued practice, particularly where there is no definite assurance that it would not be renewed. We respectfully submit that a reading of the opinion in the *Fairyfoot* case, 80 F. (2d), indicates the cease and desist order referred to is the order of the Board, and the issuance of that order was held to be justified in that

case, by reason of the fact that the Fairyfoot Company, in agreeing to discontinue the practice referred to and complained of, made only a conditional agreement, and served notice upon the Federal Trade Commission that if within six months from that date any competitor engaged in the discontinued practice, then the Fairyfoot Company would renew the practice complained of. The court held that under those circumstances the Commission was entitled to issue a cease and desist order. *The court did not enforce the Commission's order under those circumstances, in the case in* 80 F. (2d), *but the decree of the Circuit Court of Appeals for the Seventh Circuit was "the order of the Commission is affirmed."*

Following the history of the Fairyfoot controversy a little further, we find that the matter pending before the court in the case in 80 F. (2d) was upon the petition of the Fairyfoot Company seeking to review the cease and desist order. The court merely held that the Commission was authorized to issue the cease and desist order even though the practice had been discontinued. The court did not hold that that order would be enforced in the case in 80 F. (2d). This matter came on to be heard further by the Circuit Court of Appeals for the Seventh Circuit in the case of *Federal Trade Commission* v. *Fairyfoot Products Company,* 94 F. (2d) 844. In the later case, the Federal Trade Commission filed its petition, praying that a rule issue against the Fairyfoot Products Company, to show why it should not be adjudged in contempt for a violation of the former decree of the court, hereinabove referred to.

In disposing of the case, and in sustaining the motion of the respondent to dismiss, and dismissing the petition of the Federal Trade Commission, the court held that by the entry of the order of affirmance, in case No. 5426, reported in 80 F. (2d), the court was not in legal effect entering an

enforcement decree, embodying the prohibitions of the cease and desist order of the Commission, and enjoining the petitioner from violating the injunctive order of that court.

In this later *Fairyfoot* case, the Court expressly approved the rule adopted in the case of *Silver Company* v. *Federal Trade Commission*, 292 Fed. 752, and *Butterick Company, et al.* v. *Federal Trade Commission*, 4 F. (2d), certiorari denied, 267 U. S. 602. The court said:

> "Consequently, Federal Courts have concluded that the decree of enforcement 'should be upon the lines adopted by courts of equity generally in hearing suits for injunction.' "
>
> *Federal Trade Commission* v. *Fairyfoot Products Company*, 94 F. (2d) 844, 845.

The court further said:

> "The language of authorization to the Commission to apply for enforcement of its order does not prescribe or authorize any particular type of enforcement procedure, and apparently it was the intention of Congress that the Circuit Court of Appeals should utilize the usual practice adopted by courts of equity in hearing suits for injunction and formulating decrees therein."
>
> *Federal Trade Commission* v. *Fairyfoot Products Company*, 94 F. (2d) 844, 845.

We do most respectfully submit, that in using the *Fairyfoot* case as authority for its holding that a Circuit Court of Appeals should enter an order of enforcement, where the act complained of has been discontinued, the Court, in the case of *N. L. R. B.* v. *Gerling Furniture Manufacturing Company*, 103 F. (2d) 663, gave a conclusion to those cases, which the reasoning thereof does not support. Rather we insist, that the *Fairyfoot* cases, particularly in 94 F. (2d) 844, supports the insistence of the ~~respondent~~ petitioner.

Conclusion.

It is our insistence that the Order of enforcement should not have been entered under the circumstances set out and even if the National Labor Relations Board were entitled to have the Order of enforcement entered, it should never have been entered without giving effect to the explanatory and interpretative provisions of the Stipulation of which the Order is a part.

The petition for writ of certiorari should be granted, not only because of the uncertainty existing in the Circuit Courts of Appeal and among the judges thereof, with reference to the duty of the Court under circumstances of this particular type, where there is no allegation of a violation or threatened violation of the Board's Order, but also because the special circumstances related herein showing the injustice which would be done petitioner by entering the Order, without giving it the benefit of the other provisions of the Stipulation, and further because of the far reaching effect of the practice condoned by the United States Circuit Court of Appeals for the Sixth Circuit as tendering to hinder and discourage settlements of controversies between employer and employees upon charges before the National Labor Relations Board before the Board issues its formal Complaint.

Respectfully submitted,

COCHRAN & WHITE,
CHAS. C. TRABUE, JR.,
Solicitors for Petitioner.

Tab Products Co.
SPACEFINDER SYSTEMS
Model No. 4354-50

practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon all the testimony taken the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered

by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the

court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (U. S. C., Supp. VII, title 29, secs. 101-115).

(i) Petitions filed under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed.

Section 10, 49 Stat. 453;
U. S. C. Title 29, Section 160.

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 196

SOUTHERN MANUFACTURING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 22–28) are reported in 13 N. L. R. B. 304. The decree of the court below (R. 70–71) was entered without opinion and is not yet reported. The order of the court below upon petition for suspension of the decree and for rehearing (R. 82) was also entered without opinion and is not reported.

JURISDICTION

The decree of the court below (R. 70–71) was entered on February 16, 1940. A petition for sus-

pension of the decree and for rehearing was denied on April 3, 1940 (R. 82). The petition for writ of certiorari was filed on July 2, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of Febuary 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

Petitioner entered into a stipulation consenting that the Board issue against it an order in specified form, and that the appropriate court enter a consent decree enforcing the order. The court below entered such a decree. The questions presented are:

1. Whether entry of the decree was improper, either (a) because petitioner had not failed to comply with the Board's order or (b) because of the time which elapsed between the execution of the stipulation and the filing of the petition for enforcement;

2. Whether the court erred in failing to incorporate in the decree certain provisions of the stipulation which interpreted, but were not part of, the order.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. Supp. V, Sec. 151 *et seq.*) are set forth in the appendix to the petition at pp. 30–33.

STATEMENT

Following the filing of a charge and amended charge (R. 13–18) by the Amalgamated Clothing Workers of America, setting forth that petitioner had violated Section 8 (1), (3), and (4) of the Act, the Board, petitioner, and the charging union, on March 21, 1939, entered into a stipulation in settlement of the case (R. 3–6). The stipulation provided that "by agreement of the parties hereto, the National Labor Relations Board may enter its Order in the following form," setting out a form of order in full (R. 4–5). The stipulation further provided (R. 7):

> 7. The respondent, Southern Manufacturing Company, hereby consents to the entry by the United States Circuit Court of Appeals for the appropriate circuit, upon application by the Board, of a consent decree enforcing an order of the Board in the form hereinabove set forth and hereby waives further notice of the application for such decree.

On April 27, 1939, the Board issued its complaint against petitioner (R. 9–12). On May 3, 1939, the Board held a hearing, upon notice (R. 12–13), before a Trial Examiner in Washington, D. C., for the purpose of introducing in evidence the charge

and amended charge, complaint, and stipulation (R. 1–2, 37–38).[1]

On June 15, 1939, the Board issued an order (R. 22–28) identical with the form of order set out in the stipulation (R. 4–5), and on July 27, 1939, the Board filed in the court below its petition for enforcement of the order (R. 29–32). In its answer, petitioner asserted that it had complied with the terms of the stipulation, and that when it signed the stipulation it understood that application for a decree of enforcement would not be made unless it failed to comply with the stipulation (R. 33–37).[2] After first declining to enter a decree, the court below, upon motion to reconsider the petition for enforcement (R. 66), entered a decree on Febru-

[1] Prior to the issuance of the complaint and the notice of hearing the Board had notified petitioner that (R. 38):

"Under the National Labor Relations Act, the Board cannot enter an order unless a complaint has been issued and therefore the Company cannot waive the issuance of the complaint as provided for in paragraph number 2 of the stipulation. In order to carry out the understanding of the parties to the stipulation, the Board purposes to issue a complaint and notice of hearing * * *. This hearing will be for the single purpose of introducing into the record stipulations signed by the parties. After the stipulation has been introduced, no further evidence will be received, the hearing will be closed, and the order issued by the Board after such hearing will be that provided for in the stipulation."

[2] This assertion as to petitioner's understanding of the stipulation was supported by an affidavit filed by petitioner in the court below (R. 77–80), but in affidavits filed by the Board it was denied that any basis existed for the asserted understanding. See note 3, p. 5, *infra*.

ary 16, 1940, enforcing the order consented to by the parties (R. 70–71). A petition for suspension of the decree and for a rehearing (R. 72–74) was denied on April 3, 1940 (R. 82).

ARGUMENT

1. Petitioner asserts (Pet. 6) that the court below erred in entering the decree to which petitioner had consented in the stipulation, because petitioner had ceased to violate the Act before the Board's complaint was issued and because petitioner was not threatening to violate the Board's order when the Board's petition for enforcement was filed. In brief, petitioner contends that the decree to which it stipulated should not have been entered because it had not violated the Act since signing the stipulation.[3] Petitioner's contention is, of course, wholly

[3] In the stipulation petitioner unequivocally consented to the entry of a consent decree by the appropriate circuit court of appeals (*supra*, p. 3). In its answer (R. 36) to the Board's petition for enforcement and by affidavit in the court below (R. 78, 79) petitioner asserted, however, that when it signed the stipulation it understood that application for a decree of enforcement would not be made unless it failed to comply with the stipulation (R. 36). Petitioner repeats that assertion here (Pet. 2, 17–18), although not squarely positing an argument upon it.

In the first place, while petitioner has never clearly claimed that its asserted understanding was other than unilateral (see R. 36, 78, 79), the affidavits of the Board representatives not only denied that there was any understanding outside of the stipulation but affirmatively asserted that they had advised petitioner during the negotiations that the Board would apply for entry of a consent decree as soon as

unsupported by authority; if accepted it would seriously embarrass, if it would not wholly preclude, use of consent decrees both under this Act and under other legislation which is enforced by judicial decree.[4]

Petitioner's general contention (Pet. 6–7, 25–28), that an enforcement decree should not be entered without a showing of non-compliance with the Board's order is plainly lacking in merit. In support of it petitioner cites only decisions under the Federal Trade Commission Act. That Act provides (§ 5, 15 U. S. C. § 45) that "If such person, partnership, or corporation fails or neglects to obey such order of the commission while the same

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it approved the settlement stipulation (R. 66–70). The court below presumably resolved this issue of fact in favor of the Board, in so far as it found it necessary to pass upon it. Compare *Chandler* v. *Pomeroy*, 143 U. S. 318, 337.

In the second place, in the stipulation petitioner consented unequivocally to entry of the decree (**R. 6**, *supra*, p. 3), and its consent could not be conditioned by any belief or oral understanding not embodied in the written stipulation. *National Labor Relations Board* v. *Gerling Furniture Mfg. Co.*, 103 F. (2d) 663 (C. C. A. 7th). Compare *Boffinger* v. *Tuyes*, 120 U. S. 198, 205; *Van Winkle* v. *Crowell*, 146 U. S. 42.

[4] The argument here urged by petitioner was rejected in *National Labor Relations Board* v. *Gerling Furniture Mfg. Co.*, 103 F. (2d) 663 (C. C. A. 7th). And compare *National Labor Relations Board* v. *Pure Oil Co.*, 103 F. (2d) 497 (C. C. A. 5th). In *Swift & Co.* v. *United States*, 276 U. S. 311, 325–326, this Court dismissed summarily a contention that a consent decree entered under the anti-trust acts was invalid because there was no case or controversy, an argument suggested but not squarely advanced here.

is in effect, the commission may apply to the [appropriate] circuit court of appeals * * * for the enforcement of its order". Under this provision there is some authority, relied upon by petitioner, that the Federal Trade Commission must show that its order is being disobeyed before it can secure an enforcement decree. But Section 10 (e) of the National Labor Relations Act was phrased expressly to avoid such a result. Originally it was patterned after the above quoted provision of the Federal Trade Commission Act, but in conference the present provisions were substituted to make it clear that the Board might secure an enforcement decree without showing violation of its order.[5]

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[5] The report of the Conference Committee reads (H. Rep. No. 1371, 74th Cong., 1st Sess., p. 5):

"Section 10 (e) of the Senate bill provided that 'if such person fails or neglects to obey such order of the Board while the same is in effect, the Board may' petition any circuit court of appeals, etc. House amendment numbered 15 strikes out the quoted phrase and substitutes 'The Board shall have power to' petition any circuit court of appeals, etc. The conference agreement accepts this amendment. The purpose is to provide for more expeditious procedure. Delay in enforcement procedure due to technicalities would be especially harmful under this act. It is the purpose of this amendment to authorize the Board to apply to the courts for an enforcement order, without encountering the delay resulting from certain court decisions (a small minority) under the Federal Trade Commission Act, requiring the Commission to show in every case that its order is being disobeyed before the court will even proceed to consider the matter on its merits, or render a decree enforcing the Board's order. As the majority of courts have declared under the Federal Trade Commission Act, neither the administrative body nor the courts are required to assume in the ordinary

Even if petitioner has complied with the affirmative directions of the Board's order, the concomitant cease and desist provisions are in the nature of a continuing injunction having prospective operation. That petitioner had in part rectified or had for the time being discontinued its unlawful practices was not, therefore, material to the single question before the court below upon the Board's petition for enforcement: whether the Board's order was lawful when made. This Court and the various circuit courts of appeals have uniformly enforced Board orders despite contentions that the unfair labor practices in question had been discontinued before the filing of charges, or at some other date prior to the Board's application for an enforcement decree, or that the company had fully complied with the Board's order.[6] Cf. *Trade Commission* v. *Goodyear Co.*, 304 U. S. 257, 260.

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case that the unlawful practice in question, even though presently terminated, will not be resumed in the future. If such practice is resumed, there will be immediately available to the Board an existing court decree to serve as a basis for contempt proceedings."

[6] *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 271; *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 230; *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862, 873–874 (C. C. A. 2d), certiorari denied, 304 U. S. 576, 585; *Newport News Shipbuilding & Dry Dock Co.* v. *National Labor Relations Board*, 101 F. (2d) 841, 848 (C. C. A. 4th), reversed on other grounds, 308 U. S. 241; *National Labor Relations Board* v. *Pure Oil Co.*, 103 F. (2d) 497, 498 (C. C. A. 5th); *National Labor Relations Board* v. *Louisville Refining Co.*, 102 F. (2d) 678, 681

2. There was no unreasonable delay by the Board in applying for enforcement of the order issued by it pursuant to the stipulation. The stipulation was executed on March 21, 1939 (R. 6) and was approved by the Board on May 26, 1939 (R. 21). The order of the Board was entered on June 15, 1939 (R. 22) and the petition for enforcement was filed on July 27, 1939 (R. 29). Neither the Act nor the stipulation prescribes any time within which the Board must petition for enforcement, and the lapse of time here could not in any event be regarded as unreasonable, particularly in the absence of any showing of prejudice. *National Labor Relations Board* v. *La Salle Hat Co.*, 105 F. (2d) 709 (C. C. A. 3d), relied upon by petitioner, is inapposite, whether or not it was correctly decided. There the stipulation for a consent decree provided that the decree should be entered "forthwith", and a period of more than 7 months elapsed between the issuance of the order and the application for enforcement.

3. The order of the Board (R. 27–28) and the decree entered by the court below (R. 70–71) were

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(C. C. A. 6th), certiorari denied, 308 U. S. 568; *National Labor Relations Board* v. *Gerling Furniture Mfg. Co.*, 103 F. (2d) 663 (C. C. A. 7th); *National Labor Relations Board* v. *Biles-Coleman Lumber Co.*, 96 F. (2d) 197 (C. C. A. 9th); *National Labor Relations Board* v. *Oregon Worsted Co.*, 96 F. (2d) 193, 194 (C. C. A. 9th); *National Labor Relations Board* v. *American Potash & Chemical Corp.*, 98 F. (2d) 488, 493 (C. C. A. 9th), certiorari denied, 306 U. S. 643.

in the exact form consented to by petitioner (R. 4–5, 6). Petitioner may not, therefore, complain that the court below failed to incorporate in the decree various provisions of the stipulation interpreting, but not part of, the order. The matter is of no moment in any event: the interpretation of the order will be material only if there is hereafter a dispute as to compliance, and in that event the decree will be construed in the light of the entire record of which the explanatory provisions of the stipulation are a part.

CONCLUSION

The petition presents no question of general importance or conflict of decisions and should therefore be denied.

Respectfully submitted.

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AUGUST 1940.

U. S. GOVERNMENT PRINTING OFFICE: 1940